

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO PATINO VASQUEZ,

Defendant and Appellant.

A153953

(San Mateo County  
Super. Ct. No. SC063057)

Defendant Francisco Patino Vasquez appeals the denial of his motion to vacate his conviction pursuant to Penal Code<sup>1</sup> section 1473.7. Defendant contends the trial court erred in rejecting his claim of ineffective assistance of counsel. He also contends that a section 1473.7 motion can be filed regardless of whether immigration proceedings have been initiated against him. We affirm the denial of his motion.

**FACTUAL AND PROCEDURAL BACKGROUND**

In February 2007, defendant was charged by information with one count of felony possession of methamphetamine for sale (Health & Saf. Code, § 11378). The information further alleged that defendant possessed for sale or sold 28.5 or more grams of methamphetamine, or 57 or more grams of a substance containing methamphetamine (§ 1203.073, subd. (b)(2)). In brief, the evidence at the preliminary hearing showed that police officers executed a warrant at defendant's home and found methamphetamine, packaging materials, scales, and surveillance equipment in defendant's room.

<sup>1</sup> All statutory references are to the Penal Code unless otherwise noted.

Defendant, represented by counsel, pled no contest to the Health and Safety Code section 11378 count in March 2007. The minute order for the hearing reflects that defendant signed a declaration regarding his change in plea and was given the advisement required by section 1016.5. On the same day as his change of plea, the trial court suspended imposition of a sentence and placed defendant on supervised probation for three years. The court ordered that defendant serve 180 days in jail, and awarded him 169 total credits. On the same day as the change of plea and pursuant to the plea, another case pending against defendant (San Mateo Superior Court case number SM347986A) was dismissed. Defendant successfully completed probation in March 2010.

In February 2018, assisted by new counsel, defendant filed a motion to vacate his conviction pursuant to section 1473.7. Defendant asserted the conviction exposed him to the potential of mandatory removal and argued he was eligible for relief under section 1473.7 even though he has never been placed in deportation or removal proceedings. He also claimed that counsel at the time of the plea (hereinafter “former counsel”) provided ineffective assistance by failing to investigate and properly advise him of the immigration consequences of his plea, and by failing to try to negotiate a plea that would mitigate immigration consequences. In support of the motion, defendant provided a declaration stating in part that: (1) former counsel did not inform him that the conviction would bar him from obtaining legal resident status and would subject him to deportation; (2) former counsel never informed him that he was negotiating a plea that would allow him to obtain legal resident status; and (3) he has no recollection of the trial court telling him of the possible immigration consequences of his plea.

The People opposed the section 1473.7 motion. In March 2018, the trial court held a hearing on the motion. At the hearing, defendant’s new counsel offered no additional evidence. The court denied the motion. Defendant appealed.

### **DISCUSSION**

At all relevant times in this case, section 1473.7 has allowed a person who is no longer in criminal custody to file a motion to vacate a conviction if it is legally invalid due to “prejudicial error damaging the moving party’s ability to meaningfully understand,

defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.” (§ 1473.7, subd. (a)(1).)<sup>2</sup>

Defendant argues the trial court erred in denying his section 1473.7 motion because he received ineffective assistance of counsel when he entered the plea. He claims former counsel did not properly investigate and advise him of the immigration consequences of the plea, and failed to negotiate an alternative plea that would mitigate immigration consequences.

“Ineffective assistance of counsel that damages a defendant’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a guilty plea, if established by a preponderance of the evidence, is the type of error that entitles the defendant to relief under section 1473.7.” (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75 (*Ogunmowo*); § 1473.7, subd. (e)(1).) There are two elements for demonstrating ineffective assistance of counsel: first, a defendant must demonstrate that his or her counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, and second, the defendant must establish he or she was prejudiced by the deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) If a defendant fails to show either element, the ineffective assistance claim fails. (*Id.* at p. 697.)

Final judgments are presumed valid, and when a final judgment is being collaterally attacked, “ ‘all presumptions favor the truth, accuracy, and fairness of the conviction and sentence.’ ” (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) “An allegation that trial counsel failed to properly advise a defendant is meaningless unless there is objective corroborating evidence supporting appellant’s claimed failures. . . . [T]he ‘easy’ claim that counsel gave inaccurate information further requires corroboration and objective evidence because a declaration by defendant is suspect by itself. The fact is courts should not disturb a plea merely because of subsequent assertions by a defendant

---

<sup>2</sup> Effective January 1, 2019, section 1473.7, subdivision (a)(1) was amended to include the following language: “A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.” (Stats. 2018, ch. 825, § 2.)

claiming his lawyer was deficient. The reviewing court should also assess additional contemporaneous evidence.” (*People v. Cruz-Lopez* (2018) 27 Cal.App.5th 212, 223–224.)

We exercise our independent judgment in deciding whether the facts demonstrate deficient performance and resulting prejudice to a defendant, but we accord deference to the trial court’s factual determinations if supported by substantial evidence.<sup>3</sup>

(*Ogunmowo, supra*, 23 Cal.App.5th at p. 76; *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116; *People v. Tapia* (2018) 26 Cal.App.5th 942, 950; cf. *In re Resendiz* (2001) 25 Cal.4th 230, 248, abrogated in part on other grounds in *Padilla v. Kentucky* (2010) 559 U.S. 356.)

Here, defendant’s motion to vacate his conviction was lacking in critical documentation. Court minutes attached to defendant’s motion indicated there was a hearing on March 20, 2007, at which all parties and a reporter were present, and during which defendant was advised of the consequences of his plea—including being given an advisement pursuant to section 1016.5—and he signed a plea form. At the hearing on the section 1473.7 motion, the prosecutor asserted she had defendant’s plea form, and it contained a section 1016.5 advisement. That said, defendant did not present the written plea agreement or the relevant change of plea hearing transcript in support of his motion; nor are those documents in the record.

The only evidence in the record concerning what former counsel did or failed to do in the underlying criminal proceedings was defendant’s declaration attached to his motion papers. In that declaration, which defendant himself describes in his appellate briefing as “self-serving,” defendant asserted that, notwithstanding what was recorded in the court minutes attached to his motion, he has no recollection of the court explaining the possible immigration consequences of his plea and former counsel did not inform him of any immigration consequences. He also stated that former counsel never informed

---

<sup>3</sup> The People assert the appropriate standard of review is for abuse of discretion, but we agree with the cases cited herein that the independent review standard applies to this type of ineffective assistance claim.

him that he tried to negotiate a plea with mitigated immigration consequences. Defendant offered no corroborating evidence such as a declaration or testimony from former counsel, and no evidence that former counsel was unable or unwilling to provide a declaration or testify. Defendant's declaration also contains no indication that defendant had any personal knowledge of what former counsel did or failed to do as far as investigating or negotiating for viable immigration-safe plea options. (Evid. Code, § 702.) Based on this record, it cannot be said that defendant established he was not properly advised by former counsel or that former counsel failed to try to negotiate a plea with mitigated immigration consequences, such that the trial court below erred in denying his section 1473.7 motion.

Although defendant acknowledges the only evidence he offered in support of the motion was his own declaration, he contends the trial court should have either allowed him to testify or continued the matter to allow former counsel to testify. There is nothing in the record, however, indicating that defendant made any such requests below. The transcript of the hearing on the motion to vacate shows the court asked defendant's new counsel if he had anything more for the court's consideration beyond the motion papers, and counsel said he did not. As such, the claim cannot be raised on appeal. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.)

Finally, even if defendant had established that former counsel performed deficiently, he cannot prevail in his appeal without establishing prejudice from the alleged deficiencies. "To that end, the defendant must provide a declaration or testimony stating that he or she would not have entered into the plea bargain if properly advised. It is up to the trial court to determine whether the defendant's assertion is credible, and the court may reject an assertion that is not supported by an explanation or other corroborating circumstances." (*People v. Martinez* (2013) 57 Cal.4th 555, 565 (*Martinez*); *Ogunmowo, supra*, 23 Cal.App.5th at p. 78.) "Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous

evidence to substantiate a defendant's expressed preferences.” (*Lee v. United States* (2017) 137 S.Ct. 1958, 1967 (*Lee*); *In re Alvernaz* (1992) 2 Cal.4th 924, 938.)

Here, defendant argues he suffered prejudice, but there is no clear evidence in the record that supports his position. Defendant's declaration does not say he harbored any concern about possible immigration consequences at the time of his plea and does not even assert that, but for the alleged errors, he would not have entered the plea. Instead, defendant's declaration acknowledges he was the named defendant in the underlying criminal case and admits he was struggling with methamphetamine addiction at the time of the offense. In view of the fact that his plea resulted in a suspended imposition of a sentence and dismissal of another pending case against him, this acknowledgment casts doubt on whether he would have elected “to lose the benefits of [his] plea bargain despite the possibility or probability deportation would nonetheless follow.” (*Martinez, supra*, 57 Cal.4th at p. 565; see *Lee, supra*, 137 S.Ct. at p. 1966 [“A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial”].)

Notably, we invited additional briefing to address the effect, if any, of the recent amendment to section 1473.7, effective January 1, 2019, and the recent decision in *People v. Camacho* (2019) 32 Cal.App.5th 998 (*Camacho*) on the issues in this appeal. Defendant filed a letter brief, in which he claims that his accepting the plea without proper advisement regarding its immigration consequences was prejudicial error under the statute. Defendant's letter brief, however, fails to point to evidence in the record that supports his claim of prejudicial error. Defendant's declaration does not explicitly assert defendant himself erroneously believed his plea would not subject him to immigration consequences. (See *Camacho*, at p. 1009.) Further, as discussed, defendant's declaration does not state or otherwise indicate that he would not have entered his no contest plea had he received a proper advisement. (*Martinez, supra*, 57 Cal.4th at p. 565; see *Camacho*, at pp. 1010–1011.) As for defendant's suggestion that section 1473.7, subdivision (e)(2)

applies to his case, that claim is undeveloped and unsupported. Given this record, we conclude the trial court properly denied defendant's motion to vacate his conviction.<sup>4</sup>

**DISPOSITION**

The order is affirmed.

---

<sup>4</sup> In light of the foregoing, and because the trial court agreed with the defense that relief under section 1473.7 was not contingent on a defendant having been subjected to immigration proceedings, we need not and do not address defendant's final argument on appeal that a section 1473.7 motion can be filed regardless of whether immigration proceedings have been initiated against him.

---

Fujisaki, J.

WE CONCUR:

---

Siggins, P.J.

---

Wiseman, J.\*

A153953

---

\* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.